IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22261

THOMAS JERRY YEATER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

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TABLE OF AUTHORITIES

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Appellee argues "In view of these events, it is difficult to comprehend how appellant can claim that 'new facts' were presented to the board on July 5, 1966 so as to make a 'prima facie case for a new classification', within the purview of *Miller* v. *United States*, 9th Cir., December 29, 1967, No. 21,417." [Appellee's Br. p. 17]

The "events" appellee refers to are stated by it as follows: "A review of appellant's selective service file indicates an almost frantic last minute attempt to avoid induction." [p. 16]

To wait until one is in jeopardy is an almost universal characteristic, one that is especially prevalent in young men.

We believe truth, rather than time, is the test, excepting only that the time be timely. Timeliness has been construed to mean before induction. *Hull* v. *Stalter*, 7 Cir., 151 F.2d 633.

> "We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by § 5(h) of the Act, which provides that 'no * * * exemption or deferment * * * shall continue after the cause therefor ceases to exist.' The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed *judge* of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status *any time prior to his induction* into service and therefore be entitled to a deferment." [635, Emphasis supplied]

Appellee argues "It is equally incredulous that appellant can allude to a foreclosure of his administrative rights when he never appealed any of his I-A classifications".

That a registrant "never appealed his I-A classification" can be ascribed to the belief, correct no doubt, *that at the time each came* he had no basis for an appeal. That a registrant's status may change is a fact of life expressly recognized by the law. 32 C.F.R. § 1625.1 says: "Classification Not Permanent.—(a) No classification is permanent."

We argue that appellant was wronged at the time in 1966 he presented "new and further information." At that time he was deprived of the administrative procedures that could help him: the Appearance and the appeal. 32 C.F.R. § 1625.2.

> "1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification, or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board *first specifically* finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Although the wording is permissive it is a gross abuse of discretion to fail to reopen. *Brown* v. *U. S.*, 9 Cir., 1954, 216 F.2d 258:

> "If a change of status was disclosed it was the *duty* of the board to take it into consideration and to classify him in the light of the new evidence presented.

United States ex rel. Hull v. Stalter, 7 Cir., 151 F.2d 633, 635; Knox v. United States, 9 Cir., 200 F.2d 398, 401; Dickinson vs. United States, supra, 346 U.S. p. 392, 74 S. Ct. 152; Jewell v. United States, 6 Cir., 208 F.2d 770, 771." [260]

CONCLUSION

For the reasons given the judgment should be reversed.

Respectfully,

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March 22, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. Tietz, *Attorney*